

**IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA**

**SCOTT G. MANDIROLA, DIRECTOR,  
DIVISION OF WATER AND WASTE  
MANAGEMENT, AND THOMAS L. CLARKE,  
DIRECTOR, DIVISION OF MINING  
AND RECLAMATION, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**Plaintiffs,**

**v.**

**Civil Action No. 10-C-108-M**

**BLACK WOLF MINING COMPANY**

**Defendant.**

**CONSENT DECREE**

**I. Introduction**

Upon agreement to the terms herein by the Parties, Scott G. Mandirola, Director of the Division of Water and Waste Management and Thomas L. Clarke, Director of the Division of Mining and Reclamation (hereinafter collectively, the “Directors”) of the West Virginia Department of Environmental Protection (hereinafter “WVDEP”) and Black Wolf Mining Company (hereinafter “Black Wolf”), the Parties agree that it is their intent to resolve the alleged violations of the West Virginia Water Pollution Control Act (“WPCA”), *West Virginia Code* §§ 22-11-1 *et seq.*, and associated alleged violations of the West Virginia Surface Coal Mining and Reclamation Act (“SCMRA”), *West Virginia Code* §§ 22-3-1 *et seq.* (collectively, the “Acts”), and alleged violations of the rules and regulations implementing these Acts through this Consent Decree with other duties imposed as expressed herein. After consideration of public comments on the Consent Decree, as proposed, and the Parties’ responses thereto, the Court enters this Consent Decree.

**II. Parties**

The WVDEP, with an address of 601 57<sup>th</sup> Street, SE Charleston, West Virginia 25304 and Black Wolf, with an address of 640 Clover Dew Dairy Road, Princeton, WV 24740, by

execution of this written instrument, consent to the entry of this Consent Decree. The WVDEP and Black Wolf are sometimes herein collectively referred to as the "Parties."

### **III. Jurisdiction and Venue**

1. This Court has jurisdiction over the subject matter and the Parties hereto pursuant to *W. Va. Code* §§ 22-11-22 and 22-3-17.
2. Venue is proper in this Circuit Court pursuant to *W. Va. Code* §§ 22-11-22 and 22-3-17 because Black Wolf is located and doing business in this judicial circuit and because the alleged violations of the Acts and the rules promulgated pursuant to the Acts that are subject of this action occurred in this judicial circuit.

### **IV. Application of Consent Decree**

This Consent Decree applies to and is binding upon the WVDEP and Black Wolf as the permittee of several West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter "NPDES") permits, as identified in Attachment A, and permittee of the Article 3, SCMRA permits associated with those NPDES permits including, but not limited to, the No. WV1006029 ("NPDES Permit WV1006029"), and associated SCMRA D-127-82.

### **V. Findings of Fact**

1. Black Wolf is the permit holder of several SCMRA permits, including D-127-82, located near Thorpe, in McDowell County, West Virginia.
2. Black Wolf holds several NPDES permits issued by the WVDEP, including NPDES Permit WV1006029, associated with the D-127-82 Permit.
3. Each NPDES permit is issued pursuant to the WVDEP's authority under the WPCA and pursuant to authority delegated to the WVDEP by the United States Environmental Protection Agency ("EPA") under the federal Clean Water Act ("CWA") for the issuance of NPDES permits.
4. NPDES Permit WV1006029 includes two (2) outlets, Outlets 005 and 006, along with other outlets, Outlets 201, 202, and 203 that have yet to be constructed.
5. Outlet 005 typically does not discharge.
6. Selenium concentrations in the Outlet 006 discharge appear to be influenced, in part, by: 1) abandoned underground mining, commenced prior to August 3, 1977; 2) infiltration of surface water through the existing, inactive refuse fill; and, 3) watershed drainage upstream of the fill coming in contact with the existing, inactive refuse fill.

7. NPDES Permit WV1006029 contains a compliance schedule for selenium effluent limitations applicable to Outlets 005 and 006 that was scheduled to expire after April 5, 2010.
8. Per NPDES Permit WV1006029 effluent limitations for selenium were to become effective on April 6, 2010.
9. Stays preventing effluent limitations on selenium under NPDES Permit WV1006029 from going into effect were entered by the West Virginia Environmental Quality Board (the "Board"), in Appeal No. 10-10-EQB, and by the Circuit Court of Kanawha County, in Civil Action No. 10-C-1671.
10. The stays in place precluded effluent limitations for selenium from going into effect on April 6, 2010 for NPDES Permit WV1006029.

## **VI. Procedural Background**

### **A. Appeal No. 10-10-EQB**

1. Black Wolf submitted an application for modification (Modification No. 6) to its NPDES Permit WV1006029, on November 10, 2009, in order to obtain an extension of the April 5, 2010 expiration date of the compliance schedule for selenium. If granted, this extension would have prevented an effluent limitation for selenium from going into effect.
2. The WVDEP drafted a permit incorporating the Modification No. 6 changes on March 4, 2010.
3. A legal advertisement for the required public notice was placed in the Welch Daily News and published on March 8, 2010.
4. The thirty (30) day public comment period would have expired on or about April 7, 2010. The effluent limitations for selenium, if the April 5, 2010 deadline was not extended, would have been effective April 6, 2010.
5. Because the public comment period expired after the effluent limitations were to become effective, the WVDEP denied Modification No. 6 on the alleged basis that issuance of the permit would violate the anti-backsliding provisions of the CWA and the State WPCA and rules. *See* Letter from Thomas L. Clarke, Dir., WVDEP Div. of Mining and Reclamation, to Black Wolf (March 9, 2010).
6. On March 23, 2010, Black Wolf filed an appeal before the Board, in Appeal No. 10-10-EQB.

7. The Board granted a stay on March 26, 2010 for selenium limits, in Appeal No. 10-10-EQB.

B. Circuit Court of Kanawha County, West Virginia; Civil Action No. 10-C-1671

1. On September 17, 2010, Black Wolf filed a Verified Complaint for Injunctive and Declaratory Relief, against the WVDEP, regarding claims arising out of the WVDEP's denial of Black Wolf's request to modify NPDES Permit WV1006029 to extend the compliance schedule for achieving compliance with effluent limits for selenium.
2. On September 21, 2010, the Court entered an order granting an injunction.
3. The injunction, in part, provided:
  - a. The existing obligation in [Black Wolf's] [NPDES Permit WV1006029] to monitor and report the concentrations of selenium in discharges shall continue in effect, and the selenium effluent limits scheduled to take effect on or after April 6, 2010 are hereby enjoined from taking effect;
  - b. [The] order shall stay in effect until a final decision is rendered in [WV]DEP's enforcement action by the Circuit Court of McDowell County, West Virginia, Case No. 10-C-108-M and the appeal process in that matter is exhausted and the appeal process regarding the [WV]DEP's March 9, 2010 Denial Letter is exhausted by Black Wolf[.]

Order Granting Injunction (Civil Action No. 10-C-1671).

4. The stays and injunction entered by the Board and the Circuit Court of Kanawha County have prevented final selenium effluent limitations from taking effect on NPDES Permit WV1006029.

C. Circuit Court of McDowell County, West Virginia; Civil Action No. 10-C-108-M

1. On June 22, 2010, the WVDEP filed a Complaint (10-C-108-M) against Black Wolf in McDowell County, West Virginia.
2. Black Wolf is entering into this Consent Decree with the WVDEP in order to effectuate compliance with final limitations for selenium on NPDES permit WV1006029, to affirmatively address other non-compliance issues for the permits identified in Exhibit A and to resolve all claims in this action, it's Board appeal and the action that is pending in the Circuit Court of Kanawha County.

## **VII. NPDES Permit WV1006029– Selenium Effluent Limits**

1. Black Wolf has identified potential source areas of selenium and is taking steps to address the areas that are believed to be the main contributors of selenium in the effluent at Outlet 006.
2. Despite Black Wolf's efforts to come into full compliance with NPDES Permit WV1006029 selenium effluent limitations, Black Wolf has not been able to do so.

## **VIII. Effect of Settlement**

1. The Parties recognize the time, resources, expense and complexity associated with litigating the multiple claims associated with Appeal No. 10-10-EQB, Civil Action No. 10-C-1671, and Civil Action No. 10-C-108-M, asserted by the respective Parties, and as to which the respective Parties have also asserted multiple defenses, and further agree that the environmental benefit of an expeditious settlement of these actions is in the best interest of the Parties. The WVDEP is releasing all of its rights to assert a claim in the future related to any claims asserted in these matters for the period of June 1, 2007 through the date in which Black Wolf has achieved compliance with all requirements of this Consent Decree, and this Consent Decree is terminated. The foregoing shall not preclude WVDEP from taking appropriate action to enforce this Consent Decree.
2. The WVDEP has evaluated the DMRs for all permitted outlets, agency records regarding the NPDES permits, and other related information and has completed an evaluation of Black Wolf's compliance record. In completing this evaluation, the WVDEP has considered whether reported results for any parameters were in fact violations of the NPDES permits or any applicable statutory or regulatory requirement.
3. Upon entry of this Consent Decree by this Court: 1) Black Wolf shall voluntarily withdraw its permit application for Modification No.6 and diligently take actions reasonably necessary to obtain dismissal of Appeal No. 10-10-EQB before the Board, with prejudice, and dissolve the injunction currently in place; 2) Black Wolf will also seek to dismiss, with prejudice, the Circuit Court of Kanawha County action, to dissolve the injunction currently in place, and to take any other actions reasonably necessary to obtain a dismissal of that action; and 3) the WVDEP will also seek to dismiss, with prejudice, the Circuit Court of McDowell County action, and to take any other actions reasonably necessary to obtain a dismissal of that action.

## **IX. Compliance Program**

The compliance program shall apply to the interim limits contained within this Consent Decree through the date on which Black Wolf has achieved compliance with all requirements of this Consent Decree, and this Consent Decree is terminated, or until December 31, 2014, which ever shall first occur. *See* Compliance Program, **Exhibit A**. In the event the mixing zone

modification being sought by Black Wolf is approved, the applicable limits contained in the effective NPDES permit as modified shall supersede the compliance program and stipulated penalties set forth herein.

#### **X. Payments**

As part of the settlement of the WVDEP's claims in any way associated with Appeal No. 10-10-EQB, Civil Action No. 10-C-1671, and Civil Action No. 10-C-108-M and for relief under *West Virginia Code* §§ 22-11-22 and 22-3-17, Black Wolf, without admitting liability for any alleged violations or agreeing to the appropriateness of any civil penalty, shall pay for purposes of the settlement provided herein a total amount of sixty eight thousand, two hundred dollars (\$68,200.00), as well as stipulated penalties set forth herein. Said penalties include consideration by the WVDEP of relevant civil penalty assessment factors, including, but not limited to deviation from requirements, potential harm to the environment, potential economic benefit from any non-compliance, and history of compliance related to the alleged violations for which any penalty could have been assessed herein. Black Wolf shall make payments as set forth below:

- a. Black Wolf shall pay a total amount of sixty eight thousand, two hundred dollars (\$68,200.00) by certified or cashier's check to the WVDEP for deposit in the WVDEP's Stream Restoration Fund, payable within sixty (60) days of the entry of this Consent Decree, subject to any applicable public comment process.
- b. Payments shall be mailed to the following address:

Harold Ward, Deputy Director  
Division of Mining and Reclamation  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304

#### **XI. Interim Limits / End of Pipe**

The determination that the effluent from the site is or is not meeting the interim limits for selenium, will be based on the semi-monthly sampling at Outlet 006 conducted for DMRs that are required to be submitted to the WVDEP on a quarterly basis. The interim limits set forth in the Compliance Program shall be applicable. In no case shall interim limits be extended beyond December 31, 2014. Compliance needs to be done as soon as possible, but no later than December 31, 2014.

The WVDEP shall enforce the interim limits contained in the Compliance Program through the stipulated penalties set forth in section XIII of this Consent Decree. Said interim limits shall terminate after December 31, 2014. Compliance needs to be done as soon as possible, but no later than December 31, 2014. The Parties fully understand and agree that the final effluent

limitations for selenium specified in the effective NPDES Permit WV1006029 shall not become effective until January 1, 2015.

## **XII. Mixing Zone Approval**

In the event the ‘mixing zone’ NPDES modification is approved, this section, Section XII, shall override and supersede Section VII hereof, and the terms and conditions of Section VII shall no longer apply.

“In the permit review and planning process or upon the request of a permit applicant or permittee, the Secretary may establish on a case-by-case basis an appropriate mixing zone.”  
*W.Va. Code R. § 47-2-5.1*

The determination that the effluent from the site is or is not meeting the compliance standards for selenium will be based on the semi-monthly sampling at the relevant end of pipe sampling point, as determined by WVDEP, that is conducted for reporting on DMRs that are required to be submitted to the WVDEP on a quarterly basis. The monitoring point for compliance with selenium limitations identified in the ‘mixing zone’ NPDES modification will remain at the ‘end of pipe’ and the final limits will be set forth in the ‘mixing zone’ permit.

The Parties fully understand and agree that the final effluent limitations for selenium specified in the effective NPDES Permit WV1006029 shall not become effective prior to January 1, 2015. Nevertheless, if the ‘mixing zone’ permit is approved, it shall supersede all contained herein.

## **XIII. Stipulated Penalties**

1. Beginning with the effective date of this Consent Decree, Black Wolf shall be liable for stipulated penalties for violation, as outlined in Sections XII and XIII hereof, of any applicable effluent limits for selenium for the Outlet 006 that are subject to the interim limits as set forth herein:

- a. For the first 5 exceedance(s) of the same daily maximum limit at the same outlet, the stipulated penalty shall be \$1,000 for each exceedance.
- b. For the 6<sup>th</sup> through the 10<sup>th</sup> exceedance(s) of the same daily maximum limit at the same outlet, the stipulated penalty shall be \$1,500 for each exceedance.
- c. For the 11<sup>th</sup> and all additional exceedance(s) of the same daily maximum limit at the same outlet, the stipulated penalty shall be \$2,000 for each exceedance.
- d. For the first 10 exceedance(s) of the same average monthly limit at the same outlet, the stipulated penalty shall be \$3,000 for each exceedance.
- e. For the 11<sup>th</sup> and all additional exceedance(s) of the same average monthly limit at the same outlet, the stipulated penalty shall be \$5,000 for each exceedance.

2. Stipulated penalties shall be payable within thirty (30) days of receipt of a written demand from the WVDEP. Such payments shall be made by certified or cashier's check payable to the WVDEP delivered to the address specified herein for deposit in the Stream Restoration Fund.
3. The schedule of stipulated penalties provided herein is effective from the entry date of this Consent Decree through December 31, 2014. Compliance needs to be done as soon as possible, but no later than December 31, 2014.

#### **XIV. Dispute Resolution and Retention of Jurisdiction**

This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree until the Consent Decree is terminated as set forth herein. Additionally, should either Party believe that the other has failed or is failing to comply with the terms of this Consent Decree, it may petition this Court for a resolution of the issue.

#### **XV. Permits and Other Laws and Regulations**

This Consent Decree is not, and shall not be interpreted to be, a permit or modification of a permit under the WPCA, nor shall it relieve Black Wolf of any other obligation imposed by the WPCA, the NPDES permits, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve Black Wolf of its obligation to comply with any other federal or state law or any rule or regulation in any way related to the substance of this Consent Decree. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

#### **XVI. Existing Orders**

In the event any term and/or condition hereof is contrary to any term and/or condition of any existing order(s) of similar nature, the Parties hereto hereby acknowledge, fully understand and agree that the terms and conditions hereof shall be controlling as to those of any other existing order(s). In addition, any violations and associated penalties assessed which are ultimately addressed under this Consent Decree shall also satisfy any such violation and/or penalty which may be referenced in any other existing order(s).

#### **XVII. Public Notice**

The Parties acknowledge and agree that the final approval of this Consent Decree is subject to public notice and comment as provided in the applicable rules and regulations. *See W.Va. Code R. § 47-30-15.2.c.* Black Wolf shall be responsible for paying any and all fees or charges associated with the publication of a public notice regarding this Consent Decree. The public shall have at least thirty (30) days in which to make any comments on this Consent Decree, and the WVDEP reserves the right to withhold or withdraw its consent or propose modifications to this Consent Decree if warranted based on comments received during the period for public comment. If the WVDEP modifies this Consent Decree in response to public comments, Black



Wolf may either consent to, or withhold consent to, entry of the modified Consent Decree. If the WVDEP makes no changes in response to public comments, Black Wolf consents to entry of this Consent Decree without further notice. If for any reason this Court should decline to approve this Consent Decree in the form presented, this instrument is not binding on and is of no effect on the Parties.

#### **XVIII. Effective Date**

The effective date of this Consent Decree shall be the date upon which it is entered by the Court as a final judgment and order.

#### **XIX. Termination**

Termination of this Consent Decree shall be by order of the Court upon application by either Party, provided that each and all of the following conditions have been met: 1) Black Wolf has achieved complete compliance with all requirements of this Consent Decree; and 2) Black Wolf has paid all amounts required herein; and 3) all motions and other proceedings concerning this Consent Decree have been completed and are no longer subject to further judicial review and all relief resulting from such motions or other proceedings have been fully satisfied. Black Wolf needs to meet compliance as soon as possible, but no later than December 31, 2014. Once this Consent Decree is approved by the EQB and the Court and entered by the Court, the Parties further agree to the following: 1) Black Wolf agrees to voluntarily withdraw its permit application for Modification No. 6 and diligently take actions reasonably necessary to obtain dismissal of Appeal No. 10-10-EQB before the Board, with prejudice, and dissolve the injunction currently in place; 2) Black Wolf will also seek to dismiss, with prejudice, the Circuit Court of Kanawha County action, to dissolve the injunction currently in place, and to take any other actions reasonably necessary to obtain a dismissal of that action; and 3) the WVDEP will also seek to dismiss, with prejudice, the Circuit Court of McDowell County action, and to take any other actions reasonably necessary to obtain a dismissal of that action.

#### **XX. Signatories Authorized**

Each of the signatories to this Consent Decree certifies that he/she is fully authorized to enter into the terms and conditions of this Consent Decree and to bind legally the Party to the Consent Decree so represented by her or him.

#### **XXI. Other Provisions**

1. Black Wolf hereby waives its right to appeal this Consent Decree. Under this Consent Decree, Black Wolf agrees to take all actions required by the terms and conditions of this Consent Decree and agrees to and will not contest the Director's or the Court's jurisdiction regarding this Consent Decree.

2. Reasonable extensions to the herein-referenced requirements may be granted upon a prior showing, when practicable, to the WVDEP that conditions exist which are beyond the control of Black Wolf, provided that Black Wolf shall notify the WVDEP of any anticipated failure to meet any agreed deadline. If any event occurs which causes delay in the achievement of the requirements of this Consent Decree, Black Wolf shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). The term “force majeure” shall mean conditions or circumstances beyond the reasonable control of Black Wolf which could not have been overcome by due diligence and shall include, without limitation, acts of God, action or inaction of other governmental agencies, administrative or judicial tribunals or other third parties, strikes or labor disputes, which prevent or delay Black Wolf from complying with this Consent Decree. Within five (5) working days after Black Wolf becomes aware of such force majeure, oral and/or written notification shall be provided unto the WVDEP, and within ten (10) working days of initial notification, the WVDEP shall be provided a written explanation of the force majeure and of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which Black Wolf intends to implement these measures. If the Parties can agree that the delay has been or will be caused by an event of force majeure, the time for performance hereunder shall be extended for a period of time equal to the delay resulting from such circumstances. Written acknowledgment, of an event of force majeure, by the WVDEP shall be considered a binding extension of this Consent Decree and of the requirements herein.
3. Termination of or compliance with the terms and conditions of this Consent Decree shall in no way operate to relieve Black Wolf from its obligation to comply with any applicable law, statute, regulation, permit, other order, or any requirement otherwise applicable. Violations of the terms and conditions of this Consent Decree may subject Black Wolf to certain penalties and injunctive relief in accordance with the applicable law.
4. It is understood and agreed by the Parties that the compliance activities set forth herein may begin prior to and/or after the actual execution and entry of this Consent Decree, and some or all of said activities may even be completed prior to the execution and entry by the Court of this Consent Decree.
5. Any obligation imposed hereunder is an obligation which will continue during the period this Consent Decree remains in effect.
6. The provisions of this Consent Decree are severable, and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
7. This Consent Decree is binding on the Parties, their successors and assignees.

It is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_ 2012, the WVDEP by its duly authorized representatives, hereby consent to the entry of this Consent Decree, and further agrees to and enters into the agreements herein.

**DIVISION OF WATER AND WASTE  
MANAGEMENT, WVDEP**

\_\_\_\_\_  
By its DIRECTOR  
Scott G. Mandirola

**DIVISION OF MINING  
AND RECLAMATION, WVDEP**

\_\_\_\_\_  
By its DIRECTOR  
Thomas L. Clarke

And by counsel:

\_\_\_\_\_  
**Jonathan C. Frame** (WVSB #10182)  
Office of Legal Services  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304  
(304) 926-0499 x. 1702  
*Counsel for WVDEP*

\_\_\_\_\_  
Date

AND NOW, this \_\_\_\_ day of \_\_\_\_\_ 2012, Black Wolfby its duly authorized representative, hereby consents to the entry of this Consent Decree, and further agrees to and enters into the agreements herein.

**BLACK WOLF MINING COMPANY**

---

By its PRESIDENT  
Greg Jessee

And by counsel:

---

**Terry R. Sammons** (WVSB #7502)  
Sammons Law Offices, PLLC  
P.O. Box 1747  
Gilbert, WV 25621  
(304) 664-2688

---

Date

Nicholas S. Preservati(WVSB #8050)  
Preservati Law Offices, PLLC  
P. O. Box 1431  
Charleston, West Virginia 25325  
(304) 346-1431

W. Howard Sammons, II (WVSB #9714)  
The Law Office of W. Howard Sammons II, PLLC  
206 Capitol Street, Suite 1  
Charleston, West Virginia 25301  
(304) 345-7500

*Counsel for Black Wolf*